INDEX

CITATIONS

BLEED THROUGH-

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL.
JOSEPH ACCARDI, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the court below (R. 17-29) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1953 (R. 30). The petition for a writ of certiorari was filed on September 23, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether issues of fact requiring a hearing were raised by a petition for habeas corpus which attacked the validity of the denial of petitioner's application for the discretionary relief of suspension of deportation on the ground that, on information and belief, the case had been prejudged before the final decision of the Board of Immigration Appeals, where that decision on its face was based on the facts of record and previous recommendations adverse to petitioner had been made on the facts of record before the acts alleged to constitute prejudgment had occurred.

STATUTE INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended (62 Stat. 1206; 8 U.S.C., Supp. V, 155(c)), provides in pertinent part as follows:

> In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b)

that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit, affirming the dismissal of a second petition for habeas corpus, brought by petitioner after he had been taken into custody for deportation, in which he attacked the validity of the denial of his application for the discretionary relief of suspension of deportation.

Petitioner admittedly entered the United States illegally in 1932, without immigration inspection and without an immigration visa. His deportability on such grounds is not contested. The petition for habeas corpus here involved relates only to the denial of his claim for discretionary relief.

In the District Court, the respondent filed an affidavit in opposition to the granting of the petition for a writ of habeas corpus, and annexed thereto a copy of the immigration file in petitioner's case which is presently being lodged with the Clerk of this Court. From that file the following facts appear.

Deportation proceedings against petitioner were instituted in 1947 on the ground that he had entered illegally. In 1948, petitioner applied for suspenison of deportation, claiming that his departure would result in serious economic detriment to his father. Those proceedings were reopened by reason of the

decision of this Court in *Sung* v. *McGrath*, 339 U.S. 33.

Petitioner was accorded a new hearing in 1951, after which the hearing officer found him deportable on the basis of his illegal entry. The hearing officer found that petitioner's conviction in 1941 for conspiracy to defraud the United States in the years from 1934 to 1937 did not constitute grounds for deportation since petitioner had been given a suspended sentence for such offense.

The hearing officer also considered petitioner's application for suspension of deportation, founded by then on the claim that deportation would result in economic hardship to his legally resident alien wife whom he had married in 1949 and to the child which they were expecting in October, 1951. The hearing officer found as follows:

> The respondent testified that he pays $50.00 a month for rent of an apartment in the apartment house where he now resides. He receives $100.00 a month as caretaker of the apartment house. He also receives $50.00 a month plus dividends from property owned by him and another person. The record is silent as to the amount of the dividend. The respondent stated his assets consist of about thirty per cent stock in the TEAC Homes Company, which property is valued at about $5000.00. The other stockholders in this company are the respondent's brother and his wife, and another person. The respondent also owns one-half interest in a piece of property which he says is worth about

> $3000.00 at today's real estate value. Respondent and his wife own a 243 acre farm on which there is a house, farm buildings, livestock, and farm machinery having a total value of $32,000.00 on which $10,000 was paid in cash. He places his total assets at between $40,000.00 and $50,000.00.

On the basis of these facts the hearing officer stated "A careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the respondent, nor the total amount of such income." He recommended that the discretionary relief of suspension of deportation be denied.

At petitioner's request, on January 28, 1952, the hearings were ordered reopened to permit him to produce witnesses and documentary proof of his assets and liabilities. Additional hearings were held on April 16 and April 30, 1952. Petitioner did not produce an accountant's statement of his assets and liabilities, claiming that his accountant had been unable to prepare such a statement because of the death of the accountant's father. The hearing officer ruled that petitioner had had ample time to have the statement prepared and declined further to adjourn the hearings. Petitioner did, however, himself testify at the adjourned hearings, and there claimed that his assets amounted only to about $15,000 to $20,000. On May 15, 1952, the hearing officer again recommended that suspension of deportation be denied. He pointed out that, although petitioner testified that since 1941 he had supported

his 78-year-old father and in his income tax returns since 1946 had claimed the father as a dependent, and although the father had testified in 1948, in connection with petitioner's application for suspension of deportation at that time, that the father had no assets, the evidence showed that during the years 1943 and 1944, the father had made gifts to Theresa Accardi (the wife of petitioner's brother) totaling more than $50,000.

On July 7, 1952, the Assistant Commissioner concurred in the recommendation for denial of suspension, pointing out the discrepancy as to the father's assets, and the doubts as to petitioner's sources of income. He concluded that "In view of all the circumstances regarding his sources of income, his assets, and his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *."

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for relief. The opinion summarizes the facts of record, including the following facts with respect to petitioner's income:

> The respondent alleges that he is worth between $15,000 and $20,000 (p. 22-r). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he

> is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents on other properties.

The board concluded that "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion."

In the second petition for habeas corpus, the one here involved, filed by petitioner's wife on his behalf, it was alleged that the denial of discretionary relief was invalid for the reason that, on information and belief, the Attorney General on October 8, 1952, had prepared a confidential list of persons to be deported and the inclusion of petitioner's name on that list was based on confidential information outside the record. The petition alleged that by reason thereof the Board of Immigration Appeals had prejudged petitioner's case and based its determination against him on matters outside the record. There was also an offer to show that in all similar cases, aliens had been granted discretionary relief. (R. 2-5.) In a sworn affidavit submitted in opposition to the application for the issuance of the writ, an Assistant United States Attorney denied that petitioner's case had been prejudged or that the case had been considered on evidence outside the record. He also pointed out that petitioner's first application for a writ had been sued out on the eve of his scheduled departure and that the second writ was sued out just before the

petitioner was scheduled for deportation on May 19, 1953 (R. 5-8).

The District Court declined to issue the writ (R. 2), and the Court of Appeals, Judge Frank dissenting, affirmed the order of the District Court (R. 30). The majority of the court below pointed out that all decisions in the case adverse to petitioner except the decision of the Board of Immigration Appeals had been rendered before the statement of the Attorney General on which the petition was based; that the opinion of the Board of Immigration Appeals "discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation" (R. 22). The majority concluded that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation." (R. 23.) The majority were also of the view that the allegations of the petition that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens convicted of crime was completely without merit since "determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar." (R. 23.)

ARGUMENT

By isolating various factors mentioned by the majority of the court below in their decision, peti-

tioner is endeavoring to present issues of law which are not really present in this case. The majority does not hold, as petitioner claims (Pet. 8), that issues of fact may never be raised in a petition for habeas corpus by allegations on information and belief. Nor does it hold that an administrative record fair on its face can never be attacked or that administrative denial of alleged facts will always preclude inquiry into the charges made (see Pet. 7-8). The majority opinion holds that, in this case, where the evidence of record so amply supports the conclusion reached, where decisions adverse to petitioner had been made on the evidence of record by both the hearing officer and the Assistant Commissioner before the compilation of the list on which the charge of prejudgment and consideration of matters outside the record is based, where the subsequent finding of the Board of Immigration Appeals shows on its face that it is based on facts of record, it takes something more than general charges on information and belief, made in a second petition for habeas corpus, to raise an issue of fact requiring a hearing as to the validity of the denial of an application for discretionary relief which is at best granted as of grace and not of right. It is on the totality of the situation as revealed by the record, and not on any one isolated factor that the majority below reached the conclusion that the petition presented no issue of fact requiring a hearing.

Equally valid is the holding of the court below that the allegations that petitioner was treated

differently from other aliens similarly situated presented no issue of fact requiring a hearing. The administrative decision denying discretionary relief was obviously not based merely on the fact that petitioner had been previously convicted of crime. It was based on the total impression created by the fact of previous conviction of crime, the discrepancies as to the father's assets, the lack of preciseness as to the source of petitioner's assets, the difficulties in reconciling his testimony as to his earnings with the evidence of substantial wealth. Manifestly no other case, much less all other cases of aliens once convicted of crime, could present all these factors in the same degree. The allegation here involved is not, as in the cases relied upon by petitioner (Pet. 9), one which, while improbable on its face, is capable of being determined. The allegation here on its face presents no issue which is capable of proof.

Nor was there any impropriety in the procedure by which the District Court reached the conclusion, affirmed on appeal, that the petition presented no issues requiring a hearing. The majority opinion below did not, as petitioner claims, reach its conclusion "by accepting the disputed facts alleged in the opposing affidavit" (Pet. 10). As pointed out above, the effect of the majority opinion below is that, in view of the undisputed facts of record, i.e., that certain decisions had been rendered by the various administrative officers, petitioner's general allegations on information and belief were insufficient to raise an issue. The fact that in the oppos-

ing affidavit the allegations of prejudgment were denied was adverted to, but was not necessary to the decision. It is on the weakness of petitioner's allegations in the light of the record, rather than on the strength of the respondent's denials, that the decision below rests.

The procedure of ascertaining the facts of record before determining whether a petition for habeas corpus should issue was sanctioned by this Court in *Walker* v. *Johnston,* 312 U.S. 275, 284. This Court there said:

> It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the

petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

It was because no issue of fact emerged when the petition was considered in relation to the record, that the petition was properly refused.

CONCLUSION

The decision below is correct and presents no conflict of decisions. It relates only to the particular factual situation presented by all the circumstances in this case. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY, III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

OCTOBER, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 275301 491